TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1950

No. [redacted] 29

ARTHUR K. JEFFERSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 18, 1950.

CERTIORARI GRANTED MARCH 13, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 667

ARTHUR K. JEFFERSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAR. 21, 1950.

[fol. 1] [Caption omitted]

[fol. 2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 3692

ARTHUR K. JEFFERSON, Joppa, Maryland, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

COMPLAINT IN TORT—Filed July 31, 1947

1. Plaintiff is a citizen of the United States residing in the First Election District of Harford County, in the State of Maryland. This action is brought under Section 410, Title IV, Chapter 753 of the Act of August 2, 1946, 60 Stat. 843, 28 U.S.C. Section 931 and is a tort claim for damages which has never been presented to any Federal agency for administrative adjustment under the provisions of Section 403 of said Act (28 U.S.C. Sec. 921).

2. Plaintiff, on or about July 3, 1945, while on active duty as a member of the Army of the United States, was caused to undergo an abdominal operation at Fort Belvoir Hospital, Fort Belvoir, Virginia, performed by a surgeon of the United States Army Medical Corps on active duty, whose name is unknown to plaintiff and who alone and/or with other employees of the Government failed to use due and proper care and skill in attending plaintiff in that a hand towel marked "U S Medical Department" was carelessly and negligently left in plaintiff's abdomen.

3. Plaintiff was honorably discharged from the Army on or about January 9, 1946.

[fol. 3] 4. As a direct result of the presence of said hand towel in the abdomen of plaintiff, the presence of which was unknown to plaintiff, plaintiff suffered intense pain, jaundice and nausea and as a direct result of the presence of the aforesaid towel in his abdomen was caused to undergo another abdominal operation, during which the said hand towel was discovered and removed from his stomach.

The presence of said hand towel had so distorted and injured plaintiff's small intestines that a part thereof had to be removed. Further operative procedure also became necessary to permit drainage of the abdominal wound. The plaintiff was and still is unable to eat and digest food normally in normal amounts and will have to undergo further treatment for the injuries complained of and suffered by him as aforesaid.

5. Plaintiff says that the said injuries were directly caused by the negligence of the aforesaid surgeon of the United States Army Medical Corps, and/or the negligence of other employees of the Government who assisted him in the said operation while the said surgeon and the said other employees of the Government were acting within the scope of their employment for the Government without any negligence on the part of plaintiff contributing thereto.

6. As the result of said injuries, plaintiff has suffered and will continue to suffer physical pain and mental anguish and has incurred and will incur expenses for medical attention and treatment, and has lost and will permanently lose large sums from his earnings by reason of his aforesaid injuries, which are incurable and permanent.

Wherefore plaintiff demands judgment against the de-
[fol. 4] fendant in the sum of One hundred thousand dollars ($100,000.) and costs.

Tydings, Sauerwein, Archer, Benson & Boyd, By Morris Rosenberg, a Member of the firm, and Robert H. Archer, Jr., Attorneys for Arthur K. Jefferson, Office and Post Office address: 401 Davison Building, Charles and Fayette Streets, Baltimore 1, Maryland.

[fol. 5] SECOND AMENDED ANSWER—Filed 1st April, 1948

IN UNITED STATES DISTRICT COURT

[Title omitted]

SECOND AMENDED ANSWER—Filed April 1, 1948

The United States of America, defendant in the above-entitled case, by Bernard J. Flynn, United States Attorney,

and James B. Murphy, Assistant United States Attorney, in and for the District of Maryland, upon written consent of the plaintiff being first had in accordance with Rule 15 (a) of the Federal Rules of Civil Procedure, files this amended answer to the plaintiff's bill of complaint.

First Defense

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The Federal Tort Claims Act (Public Law 601, 79th Congress—ss. 921-946, Title 28 USCA) does not authorize suit against the United States of America by an officer or enlisted man of the United States Army or Navy or other military forces of the United States of America, or by a former member of the Armed Forces of the United States of America, for an injury caused by another member of the Armed Forces received by such person while a member of the Armed Forces.

Third Defense

The suit is barred by reason of the plaintiff having been awarded and accepted disability benefits under the provisions of Chapters 10, 11 and 12, Title 38 of the United States Code, and Veterans' Regulations 1 (a) promulgated pursuant to Chapter 12, Title 38, United States Code, which regu- [fol. 6] lation is recorded immediately following Section 735 of Title 38, Supp. V.

Fourth Defense

The suit is barred by the Statute of Limitations of Virginia (Section 5818, Virginia Code of 1942), the law applicable to this case, for the reason that the cause of action complained of accrued more than one year prior to institution of this suit.

Fifth Defense

Defendant admits the allegations contained in paragraphs 1 and 3 of the Complaint; alleges it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 6 of the Com-

plaint; and denies each and every other allegation contained in paragraphs 3 and 5 of the Complaint.

Sixth Defense

The employee of the defendant whose alleged negligence caused the injuries complained of and the plaintiff were on the date of the alleged negligent act "fellow-servants" of the defendant.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney, Attorneys for Defendant.

I hereby consent to the filing of this Amended Answer.
Morris Rosenberg, Attorney for Plaintiff.

[fol. 7] In the District Court of the United States for the District of Maryland

Civil Action No. 3692

Arthur K. Jefferson

v.

United States of America

Opinion—Filed October 23, 1947

Chesnut, District Judge:

This case presents another new, difficult and unprecedented question arising under the Federal Tort Claims Act. The question is whether the Act authorizes a suit by a former member of the Military Forces to recover damages allegedly caused by a negligent abdominal operation performed on the soldier on or about July 3, 1945, by an Army surgeon in the State of Virginia (the plaintiff being a citizen of Maryland), while both were on active duty. The United States has moved to dismiss the complaint on the ground that such a suit is not within the coverage of the Act.

The argument in support of the motion advances the contentions that the Act properly construed was not intended by Congress to authorize suits by members of the Military

Forces of the United States due to injuries sustained by the negligence of another member of the Forces, while on active duty, because compensation for such damages has otherwise been provided by the United States for the benefit of [fol. 8] veterans by an elaborate system of disability and pension allowances which have been long in force (38 USCA, ss. 151-205, and 38 USCA, c. 12, and Veterans' Regulations pursuant thereto). Support for this contention is based largely upon the cases of Dobson v. United States, 2d Cir. 27 F. 2d 807, cert. den. 278 U. S. 653; O'Neal v. United States, 11 F. 2d 869; (D. C. N. Y.), affd. 11 F. 2d 871; and Bradey v. United States, 2d Cir. 151 F. 2d 742, where, in suits brought against the United States under the Public Vessels Act (46 USCA, ss. 781-790) it was held the general language of the Act allowing "A libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States", is not sufficient to impose liability on the United States in a suit brought by a seaman on a public vessel for alleged injuries due to the negligence of other members of the crew. It is further argued that there is a special relationship between the United States and members of its Armed Forces, the nature of which makes it unreasonable to think that Congress intended to extend the benefits of the Act to such a situation as is here set up in the complaint because, it is further said, the status of a member of the Armed Forces with relation to the government is not the normal master-servant or employer-employee status wherein the doctrine of "respondeat superior" is applicable. It is also pointed out that the special nature and some of the incidents of this special relationship have recently been set forth by the Supreme Court in United States v. Standard Oil Co. [fol. 9] 331 U. S. —. And in this latter connection it may possibly be further suggested that such a suit could not have been fairly within the contemplation of Congress because the general statutes, duties and incidents of military service are necessarily matters of federal law, whereas the liability imposed upon the United States by the Act is only—

> "on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United

> States, if a private person, would be liable to the claimant for such damage, loss, injury, or death *in accordance with the law of the place where the act or omission occurred.*" (Italics supplied)

While this argument has plausibility and force, I have so far not been able to reach the conclusion that it is convincing in view of the scope of the wording (both affirmative and negative) of the Act itself. The most relevant provisions in the Act are these. Section 402 (b) of the Act provides—

> "'Employee of the Government' includes • • • members of the military or naval forces of the United States"

and section 402 (c) provides—

> "'Acting within the scope of his office or employment' in the case of a member of the military or naval forces of the United States, means acting in line of duty."

Section 410 (a) is the principal affirmative imposition of liability and conferring of jurisdiction on the district courts. The liability imposed is for money only on account of damages caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circum- [fol. 10] stances where the United States, if a private person, would be liable, in accordance with the law of the place where the act or omission occurred.

Section 421 sets up 12 separate and distinct classes of cases as exceptions to the general liability imposed by section 410. Here the only possibly relevant exception is section 421 (j) reading

> "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."

but it is obvious that this exception is not applicable in the present case (Skeels v. United States, 72 F. Supp. 372, D. C. La.) In construing and applying the statutory lan-

guage we therefore have an affirmative section which literally is sufficiently broad to cover the instant case; and, while there are numerous excepted situations, none of the latter are applicable, with the seeming result that the literal wording of the affirmative provision for liability should not be whittled down by construction unless there is some very controlling reason therefor.

Although the Federal Tort Claims Act, approved August 2, 1946, was the culmination of a long congressional history of consideration of similar or related Acts, counsel have not been able to refer me to any particular legislative history of the Act or its antecedents in subject matter which throws any floodlight upon the question now presented. But possibly there may be some significance in the fact that many of the prior bills upon the subject did affirmatively include in the mentioned exceptions from coverage of the law, claims [fol. 11] for which compensation was provided by the Federal Employees Compensation Act (5 USCA, s. 751, et seq.) or by the World War Veterans' Act of 1924, as amended (38 USCA, ss. 421-576).[1] As we have seen, the present Act

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[1] For instance, see Congressional Record, Vol. 86, Part 11, 76th Cong. 3d Sess. 1940, pp. 12015-12032, where the House was debating HR 7236, the major provisions of which were quite similar to the present Tort Act. See particularly the 12 exceptions contained in section 303 of this particular Bill, p. 12030. It will be noted that the Bill then under discussion in this section 303 contained 12 excepted classes of liabilities, the majority of which are the same as those in the Tort Claims Act. But it is important to note two exceptions. Thus, subparagraph 8 of section 303 of H. R. 7236, contained the following exception which is *not* in the present Act;

> "8. Any claim for which compensation is provided by the Federal Employees Compensation Act, or by the World War Veterans' Act of 1924, as amended."

And the indications from the discussion of the provisions of HR 7236 seem to be to the effect that, if that exception had not been contained in that Bill, the result would have been that military personnel could have sued under the Act

is silent in this respect and it has been said that "prints of the bill, S. 2177, in the various stages of its enactment, the committee reports and the hearings, fail to mention these statutes or give any reason for their non-inclusion. Under such circumstances, a presumption arises that where a claim [fol. 12] is cognizable under the present law, which is not barred by the two mentioned statutes relating to federal employees or to world war veterans such claim may under the election of remedies theory, be prosecuted hereunder." See article entitled "Federal Tort Claims Act—A statutory interpretation" by Gottleib, 35 Georgetown Law Journal, 1, 57. I have not been able to find in the World War Veterans' Act above referred to any specific provision with respect to the effect of the acceptance of the benefits provided thereby;

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unless the claim also fell under subparagraph 11 of the same proposed Act which read—

> "Any claim arising out of the activities of the military or naval forces, or the Coast Guard, during time of war."

It may also be important to note that there is possibly a very important difference between the wording of the exception (11) just quoted as contained in the former proposed Act, and the wording of the related exception (j) in the present Act. The latter reads—

> "Any claim arising out of *combatant* activities of the military or naval forces, or the Coast Guard, during time of war." (Italics supplied)

Apparently the word "combatant" was inserted in the present Act during the debate in the House by an amendment offered by Mr. Monroney in charge of the Bill in the House. The effect of the insertion of the word "combatant" obviously further restricts the exception; but apparently there was no explanation or discussion of the matter. See Gottlieb, 35 Georgetown Law Journal, p. 50.

The complaint in the instant case alleges that the negligent surgical operation occurred at Ft. Belvoir, Virginia, July 3, 1945, which, of course, was during the time of war at least with Japan; but it seems clear enough that the plaintiff's claim cannot be said to have arisen out of *combatant* activities during time of war.

nor have I found any judicial decision that acceptance of [fol. 13] benefits under that Act precludes resort to other possibly available legal remedies; (but see Commers v. United States, 66 F. Supp. 943) although it has, of course, been decided with respect to the Federal Employees Compensation Act (covering civilian as distinct from military personnel) that acceptance of benefits under that Act precludes suits under other federal Acts, under the doctrine of election of remedies. Brady v. Roosevelt S. S. Co. 317 U. S. 575, 577, 581; Reh. den. 318 U. S. 799; Dahn v. Davis, 258 U. S. 421; Militano v. United States, 55 F. Supp. 904 (N. Y.); United States v. Marine, 4th Cir. 155 F. 2d 456, affirming 65 F. Supp. 111 (D. C. Md.).

I am not satisfied that the reasoning of the Dobson case (supra) and its successors should be applied here. The language of the Public Vessels Act which was there involved was very general indeed (but see Canadian Aviator, Ltd., v. United States, 324 U. *D.* 215, 226). That Act provided that the United States could be sued "for damages caused by a public vessel of the United States." It did not expressly provide what classes of persons could or could not bring such suits; but did limit liability to damages caused by the vessel. It was an entirely reasonable construction of that general language to hold that it was not the intention of Congress to impose liability for personal damage to members of the ship's company arising on the ship but not caused by the ship itself as a juridical entity, in view of the long established policy of the United States [fol. 14] embraced in statutes providing benefits for navy personnel.

By contrast the affirmative provision of section 410 (a) of the Tort Claims Act is much more explicit. The section affirmatively confers jurisdiction on the district courts to—

> "render judgment on *any* claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury,

> or death in accordance with the law of the place where the act or omission occurred. Subject to provision of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees." (Italics supplied)

(Amended August 1, 1947 with respect to allowance of compensatory damages in lieu of punitive damages in certain cases. Public law 324, 80th Cong. ch. 446, 1st Sess.).

The wording of the Tort Claims Act is more analogous to the Suits in Admiralty Act than to the Public Vessels Act. Title 46 USCA, s. 742 (Suits in Admiralty Act) provides—

> "In cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel * * *."

[fol. 15], And therefore cases under the Suits in Admiralty Act would seem to be more persuasive in their applicability here than cases decided under the Public Vessels Act. In United States v. Marine, 4th Cir. 155 F. 2d. 456 (Affirming 65 F. Supp. 111, D. C. Md.) it was held that a United States Custom Inspector injured in the discharge of his duties in consequence of a defective landing ladder from a ship owned by the United States, was entitled to recover damages in a suit against the United States under the Suits in Admiralty Act, and that his exclusive remedy was not, as contended for by the government, under the Federal Employees Compensation Act. Members of the ship's company, for instance seamen employed by the United States, may and often do successfully sue under the Suits in Admiralty Act. See also for some-

what analogous cases, Dahn v. Davis, 258 U. S. 421; Payne v. Cohlmeyer, 7th Cir. 275 F. 803.

[fol. 16] But aside from the difference in wording between the Public Vessels Act and the suits in Admiralty Act and the Tort Claims Act, it is to be importantly borne in mind that the last mentioned Act represents a marked departure by the United States with respect to the waiving of sovereign immunity. It is a comprehensive Act which, subject to the exceptions therein contained, acknowledges liability of the sovereign for injuries and damages to property and persons generally where the damage results from negligence in the performance of duties by its employees. This comprehensive Act was passed subsequent to the various special Acts waiving immunity under certain conditions and to a limited extent, as in the Public Vessels Act and the Suits in Admiralty Act. By one of the exceptions it does not apply to claims or suits in admiralty against the United States under the Suits in Admiralty Act (46 USCA, ss. 741-752 inclusive) or the Public Vessels Act (46 USCA, ss. 781-790 inclusive). But outside of the specific exceptions, as already noted, it does apply to "any claim against the United States, for money only accruing on and after January 1, 1945." It is also made expressly clear that it does apply (subject to exceptions) to damages occasioned by negligent action of members of the military or naval forces of the United States acting in the line of duty. It therefore clearly covers claims against the government by virtue of negligent acts of military personnel damaging private citizens and even civilian federal employees who have not accepted benefits under the Federal Employees Compensation Act.

The only open question here seems to be whether the comprehensive authority "to adjudicate any claim" should be narrowed by construction to exclude a claim *by* military personnel arising from the negligent action of other military personnel while both were on active governmental service, [fol. 17] by reason of the special relationship existing between the government and its Military Forces, and particularly in view of the administrative disability benefits provided for disabled veterans under long established congressional legislation.

The Assistant United States Attorney contends that the inclusive phrase "any claim" must be so narrowed by construction. In support of his position he particularly relies

upon Goldstein v. New York, 281 N.Y. 396 (1939). That case held that a soldier of the New York State Militia was not an employee of the State within the meaning of its Workman's Compensation Law, and also that the State was not liable to the Administrator of the soldier killed by the alleged negligence of fellow soldiers on active duty because the latter were not officers and employees of the State within the meaning of the Court of Claims Act which waived the State's immunity from liability for the tortious acts of its officers and employees. The decision in that case, on the basis on which it was put, is distinguishable from the present case because the Tort Claims Act does expressly provide in sections 402(b) and (c) that employees of the government include military and naval personnel of the United States acting in the line of duty. But it may be said that the philosophy of the opinion in the case is broader than the actual decision. Thus, in the discussion (page 403) it was said:

> "The statement that the State may be made liable in damages to a soldier or his dependents, because of injuries inflicted upon him through the negligence of a brother soldier or officer, except as provided in the Military Law, is rather startling. We think that the general understanding has always been that for injuries suffered by a soldier in active service the government makes provision by way of a pension. That this [fol. 18] State has done in the Military Law (ss. 220-224), wherein it is provided when an allowance may be made, for what it may be made, the procedure to be followed and the amount that may be allowed. In fact a complete system is set up for handling such claims.
>
> "To justify a decision that another concurrent remedy has been created whereby the State may be made liable in unlimited amounts requires a statute to that effect, the meaning and intent of which is unmistakable."

And in holding that military personnel in the State Militia were not officers or employees of the State, it was further said (page 405):

> "Any other construction would be contrary to the history of military organization and control. * * * True it is that if the word 'officers' is given its broad

meaning it would include every officer engaged in performing a duty placed upon him by law, including the Governor, judges, members of the Legislature and all others occupying an official position in the State. Such an interpretation of the statute would lead to an absurd conclusion. The history of the development of our form of government demands that officials in performing certain functions of government cannot by their official acts create a liability against the State by their negligent performance. The language used in former section 12-a must be given reasonable construction, consistent with our conception of governmental function and public policy.

"It is urged that as the State, by former section 12-a 'consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation', it, therefore, follows that the State waives its immunity from liability in all cases for the tortious acts of its officers and makes itself liable if an individual or a corporation would be liable on the same facts. The argument overlooks the fact that under all military law the Army constitutes a class separate and apart from the civil officers of the State. In this State, it is governed by the Military Law embodied in the statute which provides in detail for the adjustment of claims like the one here in question."

Something of the same philosophy was many years ago seemingly expressed by the High Court of Australia in [fol. 19] Enever v. The King, 3 Commonwealth Law Reports of Australia, p. 969 (1906). In that case the court dealt with the Tasmania Crown Redress Act of 1891 which gave a right of action to persons with just claims against the government "in respect of * * * any act or ommission, neglect or default of any officer, agent or servant of the Government of Tasmania which would be the ground of an action at law or suit in equity between subject and subject." It was held by the court that suit would not lie at the instance of a person wrongfully arrested by a constable as the latter was not to be properly considered as an "agent or servant" of the appointing power because the exercise of his authority was original with his official position and not delegated, and he therefore acts on his

own responsibility, and furthermore, as expressed in the headnote on page 970, as the Redress Act allowed suits only which might have been brought "between subject and subject" it was not to be construed as intending to create a responsibility on the government for the acts of its peace officers whom it had appointed, that not being a liability which had ever existed against any subject exercising similar powers.

It is arguable that this judicial approach is relevant and ponderable here. In creating an Army the federal government is, of course, exercising a fundamentally important constitutional power expressly conferred, and members of the Military Forces have from time immemorial had a special relationship to the government which, of course, had (at least prior to the present Tort Claims Act) no liability to suits for injuries or disabilities incurred by the soldier in the military service, [Commers v. United States, 66 F. Supp. 943 (D.C. Mont.)] other than the purely administrative remedies provided in voluntary legislation regarding pensions and disability compensation allowances presently contained in the so-called World War Veterans' Act (supra).

[fol. 20] Possibly it may also be argued that to sustain the cause of action set up in this case really creates a heretofore non-existent tort, not within the intention of Congress, in view of the language of section 410(a) that the government is to be liable only "under circumstances where the United States, if a private person, would be liable to the claimant for such damage * * * in accordance with the law of the place where the act or omission occurred." More concretely, it may perhaps be said that as the Army surgeon was performing an official act in good faith, he was personally not liable and therefore the government would not be liable. And then again, the government is to be liable only "in accordance with the law of the place where the act or omission occurred", which, in this case, was in the State of Virginia. There has been no argument submitted by counsel as to the law of that particular State with respect to the subject matter, and if the laws of the several States are to control with respect to Army surgeons, there may be resultant lack of uniformity in the administration of the Act dependent upon varying laws of the particular States rather than on uniform federal

law applicable to army officers wherever stationed temporarily. In this connection it was said by Mr Justice Rutledge in his opinion in United States v. Standard Oil Co. supra, in considering the question as to whether the United States was subrogated to the civil rights of a soldier injured by a private party—

> "Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such a right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines."

[fol. 21] But relevant, or indeed important even, as these considerations may be I am not presently convinced that the broad and comprehensive language of the Tort Claims Act should be narrowed by construction to exclude a case not included in the numerous exceptions expressed in the Act itself. The contention to the contrary would seemingly bar any redress to a soldier for the negligent acts of other soldiers under any circumstance (combatant activities of course being specially excepted by the Act). Thus, for instance, a soldier on furlough injured by the negligent action of another soldier on active duty as a result of an automobile collision, would not be entitled to sue under the Tort Claims Act.

In view of the novelty and difficulty of the question presented by the motion to dismiss, I have concluded that it should be overruled at this time without prejudice. Perhaps the proper application of the Act will become clearer on further argument and consideration and the possible narrowing of issues by the developed facts of the particular case.

At the hearing on the motion counsel for both parties agreed on the fact that at the time of the filing of the complaint in this case (July 31, 1947) and at the present time, plaintiff has been in receipt, under the World War Veterans' Act above mentioned, of a monthly disability allowance of $138.00, but this fact does not appear in the complaint and is not now in the record by way of defense or otherwise. Counsel for the plaintiff stated as his posi-

tion in regard to this payment that it was in mitigation of damages and did not operate as a bar to the suit. Counsel for the defendant, however, has based his motion to dismiss the complaint not on this specific fact but on the [fol. 22] general construction of the inapplicability of the affirmative provision of the Act to this case. As the particular point is not now in the record and has not been fully argued, I consider it premature to base any decision thereon at this time.

Counsel may present the appropriate order in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 23] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 3692

ARTHUR K. JEFFERSON

vs.

UNITED STATES OF AMERICA

OPINION—Filed May 7, 1948

CHESNUT, District Judge:

This is a suit under the recently enacted Federal *Court* Claims Act, 28 USCA, s. 921, et seq. The plaintiff who had been an aviation mechanic at the Glenn L. Martin Company's plant in Baltimore, enlisted in the United States Army October 22, 1942. On July 3, 1945, while still in the Army he underwent an abdominal operation for gall bladder trouble at Fort Belvoir, Virginia, a Government Hospital. The operation was performed by a United States Army medical officer who was the chief surgeon at the hospital at the time. The complaint in this case is that a large towel, 30 inches long by 18 inches wide, was negligently left in the plaintiff's abdomen during the operation and remained there until it was discovered during a subsequent abdominal operation performed at the Johns Hopkins Hospital in Baltimore on March 13, 1946. He alleges total and permanent disability as a result of this alleged negligence.

The complaint was filed Juy 31, 1947. The defendant filed a motion to dismiss on the ground that the Federal Tort Claims Act did not cover a case of this kind. After extended hearing on the motion it was overruled *without prejudice*, October 29, 1947. Subsequently the defendant has filed an answer and amended answers and the case has been heard upon testimony and arguments of counsel. The evidence establishes the following briefly summarized facts.

1. When the plaintiff first enlisted in the Army he was 45 years of age. He had previously had an abdominal operation for appendicitis from which he had apparently completely recovered. About five months after enlisting and while in the Army he had an abdominal operation at an Army hospital at Indiantown Gap, Pennsylvania, dur- [fol. 24] ing which one of his kidneys was removed. After several weeks in the hospital he returned to service and was given somewhat lighter work at various aviation fields as a flight chief. From January 19 to May 17, 1943, he had various medical complaints diagnosed as hydronephrosis and a subsequent diagnosis of herpes of the lower lip reported cured on February 7, 1943; but on February 19, 1943, a further diagnosis indicated pleurisy, reported cured on March 3, 1943. From February to April, 1945, he had an ill defined condition of the gastro intestinal system including vomiting, with non-functioning gall bladder and an absence of the right kidney which had been removed on March 5, 1943. From April 24 to November 20, 1945, he had cholecystitis. The operation on July 3, 1945, made the basis of the complaint in this case, was for cholecystostomy. During the earlier portion of this period he was at Edgewood, Maryland, suffering from jaundice for two or three months until he was sent to Fort Belvoir, Virginia.

2. The plaintiff is a naturalized citizen, a native of Denmark. He was honorably discharged from the Army on January 9, 1946. On March 8, 1946, he went to the Johns Hopkins Hospital in Baltimore for treatment (because of vomiting spells and nausea which had commenced about two weeks prior to admission and grown increasingly more severe). On March 13, 1946, he was operated upon by Dr. Grose who had graduated at Johns Hopkins University

Medical School some years previously, had been an interne there in the surgical department for a year or so; had served for two or three years in the Hopkins Medical Unit in the South Pacific, and had then returned to Hopkins for a while and at the particular time was engaged in private surgical practice.

3. Dr. Grose found a well healed medical scar on the front abdomen of the plaintiff through which he again operated and as a result of the operation found a towel in the lower part of the plaintiff's stomach which had partly worked into the duodenum. This towel was removed, measured and photographed. It bore the legend "Medical Department U. S. Army". It was 2½ feet long by 1½ feet wide. Dr. Grose also found the condition and relation of the plaintiff's stomach and intestines to each other was such as to indicate very clearly that there had [fol. 25] been a previous operation on the plaintiff for gastro-jejunostomy which, in Dr. Grose's opinion, meant an opening of the stomach. The doctor expressed the opinion that there were three possibilities as to how the towel could have gotten into the plaintiff's stomach. First (theoretical largely) that it had been swallowed by the plaintiff; second, that it had been left in the plaintiff's abdomen during a surgical operation which must have occurred some months before which, if it did not involve an opening of the stomach and placing of the towel therein, had resulted in the towel working its way through the walls of the stomach into the stomach itself (and then partially back into the duodenum). While this was a possibility by reason of some few prior recorded cases of a similar nature, such a happening would be very rare indeed; third, the remaining possibility was that in a prior operation, as for instance, gastro-jejunostomy, the towel had been placed in the stomach to prevent the flow of matter from the intestines into the stomach and had been inadvertently left in the stomach when the patient's abdominal surgical wound was closed.

4. After the operation by Dr. Grose the plaintiff was subsequently treated at the Marine Hospital in Baltimore, medically and surgically. He was later examined by Dr. Grose and found to have sustained a serious hernia which was attributed by Dr. Grose to the after affects of the operation at Hopkins thought to have been caused by inflammation

or infection as a post-operative result of the removal of the towel.

5. The present physical condition of the plaintiff is that he gets some relief from the effects of the hernia by wearing a corset. He is able to walk about and stand around but cannot well lean forward either standing or sitting in a chair. After three or four hours of any activity, he finds it necessary to rest, preferably by lying down. In Dr. Grose's opinion he is not employable industrially but could do clerical work if otherwise qualified therefor. As the plaintiff is nearly 50 years of age and a mechanic by prior occupation, it is doubtful if he could engage in any gainful employable pursuit.

6. The Army Hospital at Ft. Belvoir, Virginia, is a [fol. 26] regional hospital with a large staff of hospital employees and with numerous patients in different wards. The Chief Surgeon at the hospital at that time, is now in private practice in New York City. He testified as a witness for the government that the operation at Ft. Belvoir upon the plaintiff had been conducted by himself; that he recalled the case of the plaintiff for two reasons, (1) that the plaintiff was an older man than most of the Army patients and, (2) because the plaintiff spoke English imperfectly. He did not recall in precise detail all the incidents of the particular operation but stated definitely that the operation was for cholecystostomy, which involved no opening of the stomach and that in fact he had never performed (the operation of) gastro-jejunostomy while he was in the Army service. He had been in private practice specializing as a surgeon for some ten years or more before entering the Army where he saw service in Africa and Italy before being appointed as Chief Surgeon at Ft. Belvoir. He is a graduate of recognized medical schools and a lecturer on surgery in one of them. He referred to a recorded account of the operation dictated by him to a secretary and signed by him shortly after the operation had been performed on the plaintiff, in accordance with the customary requirements of the Army. This account of the operation showed that it was for cholecystostomy which did not involve gastro jejunostomy requiring an opening of the stomach. He said that the original purpose of the operation was to remove the gall bladder but he found upon examination that it was located in such a way that this was impossible and therefore he substituted

for the removal of the gall bladder the insertion of a drain. The operation including the administration of the anesthetic lasted about four hours, and after the operation the patient was placed in an oxygen tent. He was not sure of the length of the incision that was made. Ordinarily such an operation would require only a three-inch incision. This particular one might possibly have required more. He did not use any towels such as that later found in the plaintiff's stomach although such ordinary hand and face towels were doubtless in the operating room. Such towels and bandages as were [fol. 27] used were attached to metal clips to insure facility of removal after the operation and if one had inadvertently been left in the opening it would have been discovered by an X-ray. His attention was not again called to the particular operation until a few months ago when he received a letter of inquiry from the Army stating that suit had been filed by the plaintiff based on an operation at Ft. Belvoir while he was Chief Surgeon there. The suit was filed July 31, 1947. The government did not call as witnesses any other members of the hospital staff, either assistant surgeons or nurses, some of whom must have been present during the operation. The Assistant United States Attorney stated that he was unable to ascertain who they were so long after the operation.

7. A few days after the plaintiff's honorable discharge from the Army he filed a formal application for service-connected disability benefits with the Veterans' Administration. On March 11, 1946 the plaintiff was allowed 30% disability for the removal of the kidney while in the Army, in the amount of a monthly payment of $34.50. Later, consequent upon further regular physical examinations, after the removal of the towel from the plaintiff's stomach and his subsequent increased disability, his disability rate was increased on October 16, 1947 so that he now has for some time past been receiving monthly checks for $138.00 as 100% disability. In all he has received to date as of April 30, $3,645.50, and on estimated life expectancy of 22 years under existing legislation, will prospectively receive $31,947 in addition. The original disability allowance of $34.50 was fixed by statute as the amount payable for the removal of one kidney. The increase in the allowance was in the discretion and judgment of the Veterans' Administration. By stipulation of the parties the life expectancy of the plain-

tiff at his present age, based on ordinary average mortality tables, is 22 years. His earning capacity at the Martin plant had been about $1.30 an hour with some reasonable expectation of advancement if the plaintiff had been able to return to work in the usual way. The commuted value of this earning capacity for an estimated life expectancy of 22 years would be about $45,000.

From the evidence as a whole, despite the factual difficul- [fol. 28] ties and uncertainties, I conclude that the facts justify the finding that the towel must have been placed in the plaintiff's abdomen or stomach at the time of the operation at Ft. Belvoir as alleged; and the failure to remove it before closing the surgical wound was negligence on the part of agents or employees of the government at the hospital. There was no evidence of any abdominal operation on the plaintiff other than those mentioned; and it is highly improbable that the towel could have been left in the plaintiff at the time of the kidney operation.

I conclude also that if the plaintiff is entitled to recover at all in this case the actual and prospective payments made to him by the Veterans' Administration must be, as conceded by plaintiff's counsel, treated as diminution of the amount of the verdict; and in view of all the evidence in the case, including the plaintiff's various medical and surgical disabilities preceding the operation at Ft. Belvoir, I would conclude that presently a sum of $7,500.00 would be an appropriate verdict.

However, I conclude as a matter of law and for the reasons now to be stated, that the Federal Tort Claims Act does not cover this case of the plaintiff because it was a service-connected disability occurring while the plaintiff was an enlisted man in the United States Army and occurring as a result of negligence on the part of employees of the government at the hospital.

Opinion

This case is an unusual one on the facts, and novel as to the law, and difficult as to both. The question of primary importance is whether the Federal Tort Claims Act (28 USCA, s. 921, et seq.) covers the case, that is, does it apply to a suit by an enlisted soldier in the Army of the United States injured by the alleged negligence of an Army officer as a surgeon who performed the operation on the

plaintiff, or by his assistants in the operation who were employees in the United States Army, the operation having been conducted at Ft. Belvoir, Virginia, on July 3, 1945. This question was first presented to the court on a motion by the United States to dismiss the complaint principally [fol. 29] on the ground that the Act did not cover the case. An extended opinion was filed October 23, 1947, discussing this question and stating the arguments pro and con, toward the end of which it was stated: "In view of the novelty and difficulty of the question presented by the motion to dismiss, I have concluded that it should be overruled at this time without prejudice. Perhaps the proper application of the Act will become clearer on further argument and consideration and the possible narrowing of issues by the developed facts of the particular case."

At the recent trial of the case the same question was more fully and elaborately argued by counsel orally and in briefs submitted to the court and I have given further consideration to the question. As a result of this, I reach the conclusion of law that the Act does not cover this case. In addition to the considerations mentioned in the opinion (Jefferson vs. United States, 74 F. S. 209) I have had the benefit of a recent decision of the Circuit Court of Appeals for the Fourth Circuit (State of Maryland, -use of Burkhardt vs. United States, 165 F. 2d 869) in another case involving an interpretation of the Act with respect to the applicable period of limitations, and have considered more fully the effect of other federal statutes applicable to the relations of officers and enlisted men of the United States Army to the Government of the United States. The most important of these federal statutes are those relating to the Veterans' Administration under which it now appears from the record in the case that the plaintiff is in receipt of a monthly disability allowance of $138.00.

The problem of statutory construction now presented is whether the comprehensive phrase "any claim against the United States, for money only" in section 410(a) of the Act (28 USCA, s. 931) without words of limitation as to classes of persons who may make the claim, should be narrowed by construction to exclude claims made by members of the Armed Forces of the United States for service-connected injuries sustained while in such service, in view of the special relationship long existing between the United States

and members of its military forces, and the large body of federal legislation upon the subject. These include elaborate provisions for pay and allowances and retirement [fol. 30] benefits for persons in the United States Army and Navy respectively; and even more importantly for the instant case are the statutes providing benefits for war veterans which stem from the First World War with many amendments now codified in 38 U.S.C.A., and regulations issued thereunder.[1]

It is a familiar rule of statutory construction that the merely literal reading of particular words in an Act can be narrowed by construction where, from the whole subject matter of the particular Act and its setting in the whole governmental scheme, the court can see that the literal import of the phrase used is contrary to established policy and would not accord with the real intention of Congress in passing the Act, and for this purpose we may "look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail" Takao Ozawa vs. United States, 260 U. S. 178; United States vs. Sweet, 245 U. S. 563; United States vs. Arizona, 295 U. S. 174. The problem here is made more difficult by reason of the fact, as noted in the previous opinion in this case, that section 421 of the Act (28 USCA, s. 943) contains numerous types of claims which are excepted from the coverage of the Act, none of which, however, include the instant situation, although in a prior proposed Act for the same general purpose, there was included such an exception. Nevertheless, as previously stated, I reach the conclusion that the implied exception does exist in this case. Some of the considerations which influence this view will now be stated.

It is not unusual in statutory construction to limit a general phrase by other provisions appearing in the Act as a whole. In the present case, the situation is different in that the implied exception comes not from other wording of the Act itself but from long existing other legislation

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[1] See also 10 U.S.C.A., ss. 671-920, and 938-1032; 34 U.S.C.A., ss. 381-440, and 865(a)-1001; 37 U.S.C.A. relating to the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey and Public Health Service, and 50 U.S.C.A., war appendix, 1001, et seq.

without cross-reference from one to the other. But there [fol. 31] is a fairly close precedent for the application of the latter in the cases of Dobson vs. United States, 2d. Cir. 27 F. 2d. 807, cert. den. 278 U. S. 653, and O'Neal vs. United States, 11 F. 2d. 869, affd. 11 F. 2d. 871, and Bradey vs. United States, 2d. Cir. 151 F. 2d. 742, where, in suits brought against the United States under the Public Vessels Act (46 USCA, ss. 781 to 790) it was held that the general language in the Act allowing "A libel in personam in admiralty may be brought against the United States * * * for damage caused by a public vessel of the United States," is not sufficient to impose liability on the United States in a suit brought by a seaman on a public vessel for injuries due to alleged negligence of other members of the crew. And in Burkhardt vs. United States, 4th Cir. 165 F. 2d. 869, the literal wording of another phrase in section 410(a) of the Act (28 USCA, s. 931) was held not applicable in view of other provisions of the Act with regard to limitations.

It is clear enough that the main purpose of the Act was to waive the then existing sovereign immunity of the United States with respects to the ordinary run of tort claims arising in the United States. (See Employees Fire Ins. Co. vs. United States, 9th Cir. April 8, 1948; and Grace vs. United States, D. C. Md. 76 F. S. 174). But it is to be noted that the Tort Act was only a part (Title IV) of an even more comprehensive Act entitled the "Legislative Reorganization Act of 1946." As emphasized in the Burkhardt case, supra, section 131 of Title I of this Legislative Reorganization Act prohibited institution in Congress of *private bills* for the payment of money for property damages or for personal injuries which might thereafter be made the basis of suits in a district court under the Tort Claims Act. It is well known that in recent years Congress has been quite flooded with private bills of that nature, and it was obviously one of the important purposes of the whole Act to transfer consideration of such claims from an otherwise over-burdened Congress to the federal courts. In this respect the Tort Act (Title IV) was complementary to the provisions of section 131 of Title I of the Legislative Reorganization Act. It is thus fairly inferable that an important if not the main motivation of Congress in [fol. 32] enacting the Tort Act was to transfer such claims to the courts. But so far as I am aware, private bills for

the benefit of soldiers for damages resulting from service-connected injuries were at least not common, in view of the long established provisions for the armed forces, including the Veterans' Administration established during or shortly after the First World War. It is probable, therefore, that claims of that nature, as illustrated by the instant case, were not within the contemplation of Congress in enacting this particular legislation.

What Congress must have specially had in mind was the ordinary run of tort claims affecting ordinary citizens or others arising from time to time. This is apparent from the phraseology adopted in section 410(a) furnishing the test of liability "in accordance with the law of the place where the act or omissions occurred." And this particular purpose of the Act becomes even more apparent when reference is made to the Committee Reports of the Senate and House in submitting the Legislative Reorganization Act. Thus, it was said in Senate Report No. 1400, and also in the House Committee report of July 22, 1946, in summarizing the existing law and purpose of the Tort Act as follows:

"As a result of the statutes briefly summarized above, the Government is subject to suit in contract, on admiralty and maritime torts, and for patent infringement. On the other hand, no action may be maintained against the government in respect to any *common-law tort*. The existing exception in respect to *common-law torts* appears incongruous. Its only justification seems to be historical. With the expansion of governmental activities in recent years, it becomes especially important to grant to *private individuals* the right to sue the government in respect to such torts as negligence in the operation of vehicles." (Italics supplied.)

And again in commenting on the stated exceptions to the Act appearing in section 421, it was said that the exceptions include "claims which relate to certain governmental activities which should be free from the threat of damage suits, or for which adequate remedies are already available."

I do not interpret the reference to common-law torts in the strictly technical sense of the term because the test of liability as stated in section 410(a) is somewhat broader in that it would include statutory torts, such as suits under

Lord Campbell's Act for death claims provided for by the [fol. 33] statutes of the particular States, which were not theretofore cognizable at common law. But it would seem clear enough that injuries sustained by members of the armed forces of the United States during their service would not be within the general scope of the kinds of actions to which the Committee Report was referring because it is clear enough that such injuries did not constitute common law or statutory torts under the laws of the several States. Indeed, it is not understandable how any State legislation could properly have affected the relations of the United States to members of its armed forces which, of course, depended purely on federal law.

Still further support for the conclusion reached is to be found in the recent decision of the Supreme Court in United States vs. Standard Oil Co. of California, 332 U. S. 301, where the dominant issue was whether the United States was subrogated to the right of action of a soldier against a third person, by reason of expense incurred by the government in caring for its soldiers under existing federal legislation. The court held that the right of subrogation did not exist because not provided for in federal law, and that it would be incongruous to give such a right of action in view of the variable State laws which might apply to any particular soldier dependent upon where he happened to be at the time. Thus in the opinion it was said:

> "Not only is the government-soldier relation distinctively and exclusively a creation of federal law, but we know of no good reason why the Government's right to be indemnified in these circumstances, or the lack of such right, should vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies, across state lines."

And again (page 305)—

> "Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces * * *, the scope, nature, legal incidents and

> consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."

The case strongly emphasizes the particular nature of government-soldier relationship and this furnishes strong support for the view that it was not the intention of Congress in passing the Tort Claims Act to include in the phrase "any claim" those by former soldiers for service-connected [fol. 34] disabilities for which there was already existing a large body of federal legislation.

Again it may be noted that section 410(a) also provides with respect to the test of liability as follows:

> "Subject to the provision of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances,".

This phraseology is seemingly inapt if it had been the intention of Congress to give soldiers additional redress for service-connected disabilities. It is hardly conceivable to analogize the liability of the United States to that of a private individual in respect to service-connected disabilities in view of the government-soldier particular relationship.

It is also to be noted that section 424(a) of the Act (not included in codification in 28 U.S.C.A., ss. 931, et seq.) repeals certain specific statutes authorizing "any Federal agency to consider, ascertain, adjust or determine claims on account of damage to or loss of property, or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, * * * in respect of claims cognizable under Part 2 of this title" (which provides for an administrative action) and accruing on and after January 1, 1945, including, among other statutes so repealed "Public law numbered 112, as amended, Seventy-eighth Congress, approved July 3, 1943 (57 Stat. 372, U.S.C., title 31, secs. 223b, 223c and 223d)." Section 223(b) known as the Military Claims Act, authorized the Secretary of the Army to determine, settle and pay any claims for damages not in excess of $1,000 "caused by military personnel or civilian employees

of the Department of the Army". Counsel for the respective parties advance contrary arguments from this repealing section of the Act. For the plaintiff, it is argued that prior to the Act it was the policy of Congress by the Military Claims Act to recognize claims by as well as against military personnel at least up to $1,000; and that the provision was repealed because thereafter such claims were comprehensively covered by the Tort Act. But to the contrary, counsel for the government points out that [fol. 35] by the amendment of May 29, 1945, the prior Act of 1943 was amended to exclude "claims for personal injury or death of military personnel or civilian employees of the Department of the Army or of the Army, if such injury or death occurs incident to their service". This, he says, is indicative of the general policy of Congress not to recognize claims by military personnel for injuries occurring incident to their services, other than through pensions or Veterans disability allowances. And he further points out that anyhow the Military Claims Act authorizes settlement only up to $1,000 and the purpose of the repeal was because the Act was no longer necessary by reason of the provisions of Part 2 of Title IV of the Tort Act which provided for administrative adjustment of tort claims against the United States. The latter reason for the repeal seems sound and I therefore find no reason to think that the repeal of this particular statute aids the plaintiff's construction of the Act. On the contrary, the quoted proviso in the Military Claims Act is at least indicative of general congressional policy not to recognize claims by military personnel for service-connected disabilities otherwise than through the general statutory provisions.

The government relies on some other defenses which need be only mentioned. The most important of these is the contention that even if the Tort Act covers this case the voluntary acceptance of veterans' benefits by the plaintiff constitutes an election to rely upon that form of relief and excludes the right to have a cumulative remedy by suit for tort. In support of this contention counsel cite cases to the effect that suits by various employees of the United States to recover for injuries sustained from other employees of the government, acting in the course of their duties, have been barred by the voluntary acceptance of benefits under the Federal Employees Compensation Act, covering civilian as distinct from military personnel. These

cases were referred to in the prior opinion in this case but without the necessity of expressing an opinion thereon.[2] While there is at least a plausible analogy between the [fol. 36] principles involved in the cases cited and that of the instant case, I do not find it necessary to now base a decision thereon in view of the conclusion already reached.

Because the cause of action, if any, in this case, arose in the State of Virginia, it is contended that the limitation statute of that State should be here applied instead of the law of the forum. It is said that the Virginia Code of 1942, s. 5818, established a period of one year for a suit of this nature and that the instant suit was not brought within one year. But this contention is now clearly untenable in view of the decision in the Burkhardt case, supra, that the limitation period in the Tort Claims Act itself is controlling. As provided in section 420 of the Act, the suit was brought within one year thereafter.

Counsel for the government also contends that as the test of liability is that established by the law of the place where the cause of action arose, in this case Virginia, the defense of the fellow-servant doctrine which exists in Virginia in cases of suits for damages resulting from negligence, should apply. But it seems quite clear that this defense would not be applicable in the instant case, where a surgical operation is performed upon the plaintiff, because the operating surgeon and the patient could not fairly be described as co-workers even if they were co-employees of the same employer.

In view of the conclusion reached as to the scope of the Act it was of course unnecessary to make specific findings of fact with regard to the act of negligence alleged by the plaintiff. But I have done so in this case in view of the doubtful question of the proper coverage of the Act, and

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[2] The cases referred to are Bradey vs. Roosevelt S.S. Co., 317 U. S. 575, 577, 581; rehearing denied 318 U. S. 799; Dalm vs. Davis, 258 U. S. 421; Milletano vs. United States, 55 F.S. 904 (N.Y.); United States vs. Marine, 155 F. 2d. 456, affirming 65 F.S. 111 (D.C. Md.); See also the discussion in a case note in Vol. 61 Harvard Law Review 550, on the former opinion in this case; and an analysis of the Tort Act by District Judge Hulen, printed in 7 Fed. Rules Dec. pp. 689, 694, 695.

for the purpose of possibly avoiding the necessity of further loss of time and expense to the parties and witnesses for a retrial, in the event that the case should be appealed and it should be finally held that the case is covered by the Act.

As previously indicated, the case is a difficult one on the facts as well as on the law. The nature of the suit is a typical one for professional malpractice; but nevertheless the facts of the particular case are quite unusual and the conclusion which I have reached on the facts that there was negligence proximately resulting in damage to the [fol. 37] plaintiff is not free from all doubt. However, in view of the length of this opinion and the prior opinion in the same case, I will not unduly prolong discussion of the facts because, although they are unusual, after all it is merely a fact question to be determined by the court without a jury. The plaintiff is not obliged to prove the fact beyond a reasonable doubt, but only by a preponderance of the evidence. To establish the negligence plaintiff's counsel relies strongly upon the common law doctrine or rule of *res ipsa loquitur*. It is conceded by counsel on both sides that the rule applies in proper cases both under the Virginia and Maryland decisions and my attention has not been directed to any important difference between the two States with respect to the application of the rule to the instant case.[3] But the rule itself is only one from which after proof of the main fact alleged by the plaintiff, the trier of facts is permitted to infer negligence in the absence of a sufficient exculpatory explanation by the defendant. In this case the fact alleged by the plaintiff is the negligent failure of the defendant to remove a towel from his abdomen or stomach which had been placed there in the course of surgical operation on July 3, 1945 at Fort Belvoir, Virginia. There is no direct proof of this particular fact alleged and the rule of *res ipsa loquitur* would not of itself be sufficient to prove the fact as well as the inference of

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[3] For a review of the Maryland cases, see an extended paper upon the subject by Mr. Roszel C. Thomsen of the Baltimore Bar, to be found in Vol. III Maryland Law Review, pp. 285 to 313. See also for a recent discussion of the rule in this Fourth Circuit, Lachman vs. Penn Greyhound Lines, 160 F. 2d. 496; Coca-Cola Bottling Co. vs. Munn, 99 F. 2d. 190.

negligence. However, on the evidence as a whole, I have found as a fact that the towel must have been placed or left in the plaintiff's body at Fort Belvoir, Virginia. And having thus found this fact the rule justifies the inference that there must have been negligence in leaving the towel in the plaintiff's body, in the absence of any convincing evidence of the lack of negligence in doing so. The only evidence submitted by the defendant with respect to the operation in question was to the effect that no towel was used in the operation. Of course if the trier of facts so found, that would be an end of the plaintiff's case. But as I have felt [fol. 38] obliged to reject this conclusion of fact, I must treat the case as one where the fact has been proved and there is no explanation by the defendant of how the very unusual fact occurred.

For the reasons stated, I have concluded that the complaint must be dismissed with allowance of the usual taxable court costs. Counsel may submit the appropriate order in due course.

W. Calvin Chesnut, U. S. District Judge.

[fol. 39] In the District Court of the United States for the District of Maryland

Civil No. 3692

Arthur K. Jefferson

vs.

United States of America

Order Dismissing Bill of Complaint—Filed May 11, 1948

This cause of action having come on for trial on the allegations made in the Bill of Complaint and the defenses set forth in the amended answer thereto, and this Court having heard the testimony of the witnesses for both sides and argument of counsel, and being fully advised in the premises, it is

Ordered, this 11th day of May, 1948, that the Complaint be and the same is hereby Dismissed with allowance of the usual taxable Court costs for the reasons set forth in the written opinion and findings of this Court filed on May 7, 1948.

W. Calvin Chesnut, United States District Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS—Filed July 6, 1948

Notice is hereby given that Arthur K. Jefferson, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final judgment entered in this action on May 11, 1948.

Dated: July 7, 1948.

Morris Rosenberg, Robert H. Archer, Jr., 405 Davison Building, Baltimore—1, Maryland, Attorneys for Appellant.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF PLAINTIFF AND ORDER OF COURT EXTENDING TIME FOR FILING AND DOCKETING APPEAL—Filed August 12, 1948

The petition of Arthur K. Jefferson, plaintiff in the above-entitled and numbered case, respectfuliy represents:

1. On July 6, 1948, your petitioner filed a notice of appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the final judgment of this Honorable Court denying him relief under The Federal Tort Claims Act and the 40 days for perfecting the appeal will expire on August 18, 1948.

2. Your petitioner has been advised by counsel that it is questionable whether he may proceed in *forma pauperis* despite lack of funds since counsel has the case on a contingent fee basis and it may therefore become necessary for your petitioner to try to borrow funds if the appeal is to be prosecuted.

3. Under the circumstances, your petitioner would like to have as much time as possible to determine whether to prosecute the appeal, and he prays that this Honorable Court pass an order extending the time for filing the record

on appeal and docketing the appeal to and including October 4, 1948.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys for Plaintiff.

CONSENT

The defendant hereby consents to the passage of an order as prayed.

Bernard J. Flynn, United States Attorney, James B. Murphy, Assistant United States Attorney, Attorneys for Defendant.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

Upon the foregoing petition and consent, it is ordered this 12th day of August, 1948, by the District Court of the United States for the District of Maryland that the time for filing the record on appeal and for docketing the appeal in the above-entitled cause be, and the same is hereby, enlarged and extended to and including October 4, 1948.

W. Calvin Chesnut, United States District Judge.

[fol. 43] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ORDER OF COURT THEREON—Filed September 13, 1948

STATE OF MARYLAND,
City of Baltimore, ss:

Arthur K. Jefferson, being duly sworn, deposes and says:

1. I am a citizen of the United States.

2. I am the plaintiff in the above entitled action which was brought by me under the Federal Tort Claims Act

(revised 28 USC, sections 1346(b), 1402, 2402, 2411, 2412, 2674, etc.), and I am entitled to maintain the said action.

3. The said action came on for trial before this Court and a judgment was rendered therein against me by this Court on the 11th day of May, 1948.

4. I have filed a notice of appeal from said judgment to the United States Court of Appeals for the Fourth Circuit, and pursuant to an order of this Court, passed in this action on the 12th day of August, 1948, may file the record on appeal and docket the appeal on or before October 4, 1948.

[fol. 44] 5. My appeal is based upon the ground that a soldier of the United States Army is entitled to the benefit of the Federal Tort Claims Act when injured by other military personnel while both were acting in line of duty.

6. I believe I am entitled to the redress sought to be obtained in said action and by said appeal.

7. Because of my poverty, I am unable to pay the costs of said appeal or to print the record therein or to give security for the same.

8. There is no person interested by contract or otherwise in the said appeal or entitled to share in any recovery thereunder, who is able to pay or secure said costs, except my attorneys who are entitled to share in any recovery only to the extent that this Court may allow them a fee within the limits prescribed by Section 2678 of Revised Title 28 of the United States Code.

9. Unless I am permitted to proceed *in forma pauperis* in the United States Court of Appeals for the Fourth Circuit for a review of the above entitled action, I will be utterly unable to rectify the judgment of this Court.

Wherefore, deponent prays that he may have leave to prosecute the said appeal *in forma pauperis*, pursuant to the provisions of Section 1915 of Revised Title 28 of the United States Code.

Arthur R. Jefferson, Plaintiff.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, this 10th day of September, 1948. Ethel V. McKean, Notary Public (Notarial Seal).

[fol. 45] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

This cause coming on to be heard upon the application of Arthur K. Jefferson, Petitioner, to be allowed to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit *in forma papueris*, and based upon affidavit of the said Arthur K. Jefferson verified the 10th day of September, 1948, and filed in accordance with the provisions of Section 1915 of revised Title 28 of the United States Code, it is

Ordered this 13th day of September, 1948 that the said Arthur K. Jefferson be allowed to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit without being required to prepay fees or costs before or after bringing said appeal and without making a deposit or executing a bond for costs because of his poverty as alleged in said affidavit.

And it is further ordered that all judicial officers who have occasion to perform services therein shall perform the same as if the deposit for costs or security for costs had been given.

W. Calvin Chesnut, United States District Judge.

[fol. 46] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

JOINT DESIGNATION AS TO RECORD ON APPEAL—Filed September 17, 1948

It is hereby stipulated by and between counsel for the parties hereto that there shall be but one transcript of record on appeal in the above entitled case and that the record on appeal in said case shall consist of the following items:

1. The Complaint.
2. Amended Answer to the Complaint.
3. Order of Court dismissing the Complaint.
4. Opinion of the Court.

5. Notice of Appeal.

6. Petition and Consent and Order of Court thereon extending the time for filing the record on appeal and docketing the appeal.

7. Affidavit for leave to proceed *in forma pauperis* and order of court allowing plaintiff to prosecute his appeal to the United States Court of Appeals for the Fourth Circuit *in forma pauperis*.

8. A concise statement of the point relied on.

9. This Stipulation.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys for plaintiff-appellant.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for defendant-appellee.

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINT RELIED ON BY PLAINTIFF—Filed Sept. 17, 1948

Plaintiff is entitled to a money judgment against the Government under the pertinent provisions of the Federal Tort Claims Act (revised Title 28 USC, sections 1291, 1346(b), 1402, 2402, 2411, 2412, 2671, 2674, and 2680), for the injuries which the United States District Court found he sustained on July 3, 1945 as a direct result of an abdominal operation negligently performed on him by Government employees at Fort Belvoir, Virginia while he was a soldier of the Army of the United States.

Morris Rosenberg, Robert H. Archer, Jr., Attorneys for Plaintiff.

Service of copy admitted this 17th day of September, 1948.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for Defendant.

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO ADDITION TO RECORD ON APPEAL—Filed September 28, 1948

It is stipulated and agreed between counsel in the above-entitled cause of action that in addition to the papers designated in the joint designation as to the record on appeal filed in this case that the opinion of the District Court filed in this case on October 23, 1947 be included among the record on appeal.

Bernard J. Flynn, United States Attorney; James B. Murphy, Assistant United States Attorney; Attorneys for Defendant. Morris Rosenberg, Attorney for Plaintiff.

[fol. 49] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 50] IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore

October 6, 1948, the transcript of record is filed and the cause docketed.

Same day; petition and order extending the time to and including October 4, 1948, within which to file the record on appeal and docket the appeal, are filed.

IN UNITED STATES COURT OF APPEALS

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS—Filed October 6, 1948

STATE OF MARYLAND,
City of Baltimore, ss:

Arthur K. Jefferson, being duly sworn, deposes and says:

1. I am a citizen of the United States.

2. I am the appellant in the above entitled action which was brought by me under the pertinent sections of the Federal Tort Claims Act (28 USCA, Sections 921 et seq. prior to its recodification under the new Judicial Code) and I am entitled to maintain the said action.

3. The said action came on for trial before the United States District Court for the District of Maryland and a judgment was rendered therein against me by said Court [fol. 51] on the 11th day of May, 1948.

4. I have filed a notice of appeal from said judgment to this Court, and, pursuant to an order of the United States District Court for the District of Maryland, dated the 13th day of September, 1948, I was authorized to prosecute the appeal *in forma pauperis*.

5. My appeal is based upon the ground that a soldier of the United States Army is entitled to the benefit of the Federal Tort Claims Act when injured by other military personnel while both were acting in line of duty.

6. I believe I am entitled to the redress sought to be obtained in said action and by said appeal.

7. Because of my poverty, I am unable to pay the costs of said appeal or to give security for the same.

8. There is no person interested by contract or otherwise in the said appeal or entitled to share in any recovery thereunder, who is able to pay or secure said costs, except my attorneys who are entitled to share in any recovery only to the extent that the United States District Court for the District of Maryland may allow them a fee within the limits prescribed by Section 2678 of Revised Title 28 of the United States Code.

9. Unless I am permitted to proceed *in forma pauperis* in this Court for a review of the above entitled action, I will be utterly unable to rectify the judgment of the United States District Court for the District of Maryland.

Wherefore, deponent prays that he may have leave to prosecute the said appeal *in forma pauperis*, pursuant to the provisions of Section 1915 of Revised Title 28 of the [fol. 52] United States Code.

Arthur K. Jefferson, Appellant.

Subscribed and sworn to before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, this 5th day of October, 1948. Ethel V. McKean, Notary Public.

IN UNITED STATES COURT OF APPEALS

ORDER PERMITTING APPELLANT TO PROSECUTE APPEAL IN FORMA PAUPERIS—Filed and entered October 6, 1948

Upon the affidavit and petition of the appellant, and for good cause shown,

It is ordered that the appellant in the above entitled cause be, and he is hereby, permitted to prosecute his appeal in this Court *in forma pauperis*, and to file six (6) typewritten copies of his brief and appendix instead of twenty-five (25) printed copies as required by the Rules. October 6th, 1948.

John J. Parker, Chief Judge Fourth Circuit.

October 6, 1948, the appearance of Morris Rosenberg and Robert H. Archer, Jr., is entered for the appellant.

October 14, 1948, the appearance of H. G. Morison, Assistant Attorney General; Morton Hollander, Attorney, Department of Justice; Bernard J. Flynn, U. S. Attorney, and James B. Murphy, Assistant U. S. Attorney, is entered for the appellee.

October 18, 1948, brief on behalf of the appellant is filed.

November 2, 1948, brief on behalf of the appellee is filed.

[fol. 53] IN UNITED STATES COURT OF APPEALS

ARGUMENT OF CAUSE

November 17, 1948, (November term, 1948) cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

IN UNITED STATES COURT OF APPEALS

ORDER DEFERRING DECISION—Filed and Entered January 4, 1949

The decision of this Court in the above entitled case be, and it is hereby, deferred, pending the action of the Supreme Court in cases now pending before it involving the same question of law.

January 4th, 1949.

John J. Parker, Chief Judge Fourth Circuit.

June 2, 1949, the appearance of Morton Hollander is entered for the appellee.

June 10, 1949, joint application of the parties for a continuance of the re-argument is filed.

IN UNITED STATES COURT OF APPEALS

ORDER CONTINUING RE-ARGUMENT—Filed and Entered June 13, 1949

Upon the application of the appellant, by his counsel, and for good cause shown.

It is ordered that the re-argument of the above entitled case be, and the same is hereby, continued from the June Term, 1949, of the Court, to the October Term, 1949, of the Court.

June 13, 1949.

John J. Parker, Chief Judge, Fourth Circuit.

September 13, 1949, brief of appellant on re-argument is filed.

October 29, 1949, brief on behalf of appellee on re-argument is filed.

[fol. 54] IN UNITED STATES COURT OF APPEALS

RE-ARGUMENT OF CAUSE

November 8, 1949, (November term, 1949) cause came on again to be heard before Parker, Soper and Dobie, Circuit Judges, and was re-argued by counsel and submitted.

[fol. 55] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore

CIVIL

(Re-Argued November 8, 1949. Decided December 19, 1949)

Before PARKER, SOPER and DOBIE, Circuit Judges.

Morris Rosenberg (Robert H. Archer, Jr., on brief) for Appellant, and Morton Hollander, Attorney, Department of Justice, (H. G. Morison, Assistant Attorney [fol. 56] General; Bernard J. Flynn, U. S. Attorney; James B. Murphy, Assistant U. S. Attorney; Paul A. Sweeney and Massillon M. Heuser, Attorneys, Department of Justice, on brief) for Appellee.

OPINION—Filed December 19, 1949

SOPER, Circuit Judge:

This suit was brought by a member of the armed forces of the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 2674 et seq., to recover for personal injuries resulting from a surgical operation performed by an army surgeon at Fort Belvoir, Virginia. It was found by Judge Chesnut at the trial in the District Court, 77 F. Supp. 706, that a towel used during an operation had been left in a

surgical wound through the negligence of government employees at the hospital, and in consequence the plaintiff had suffered serious injuries for which $7,500 would be an appropriate verdict if the case were tenable. The judge held, however, that the statute was not intended to cover claims by members of the armed forces of the United States for service connected injuries suffered while in the service. He therefore dismissed the case on motion of the United States and this appeal followed.

In the meantime the Supreme Court, upon an appeal from this court, rendered its decision in *Brooks* v. *United States*, 337 U. S. 49, in which it held that two soldiers riding in their own automobile while on leave were entitled to recover for injuries received when they were struck by a United States Army truck driven by a civilian employee of the Army. That decision established that members of the armed forces of the United States can recover under the Federal Tort Claims Act for injuries not incident [fol. 57] to their service, but left open the question whether the statute also covers claims by service men for injuries incident to their service. The court said: (pp. 52-3)

> "The Government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in its context do Dobson v. United States, 27 F. 2d 807, Bradley v. United States, 151 F. 2d 742, and Jefferson v. United States, 77 F. Supp. 706, have any relevance. See the similar distinction in 31 U.S.C. § 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. Lawson v. Suwannee Fruit & Steamship Co., 336 U. S. 198. The Government fears may have point in reflecting congressional purpose to leave injuries incident to service where

they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us."

[fol. 58] Since this decision was rendered, the question not decided by the Supreme Court has been considered in the Second and Tenth Circuits which came to opposite conclusions. In *Feres, Ex'r* v. *United States*, 2 Cir., decided Nov. 4, 1949, it was held that the estate of an army officer killed in a fire in unsafe army barracks in which he had been quartered through the negligence of superior officers was not entitled to recovery for his death; but in *Griggs, Ex'r* v. *United States*, 10 Cir., November 16, 1949, it was held that the estate of an army officer could recover under the act for his wrongful death caused by the negligence of members of the Army Medical Corps while he was under medical treatment. The Second Circuit based its decision largely upon the provision which Congress has made for military persons in the form of disability payments and pensions. The Tenth Circuit found more persuasive the broad language of the statute and the fact that Congress failed to except service connected injuries of military personnel although bills containing such exceptions had been presented for its consideration.

We are in accord with the conclusions reached by the Second Circuit. The choice lies between a literal interpretation of the Act and a construction which recognizes the peculiar relationship that exists between a member of the armed services and superior military authority. Congress was plainly impressed with the large number of justified complaints on the part of persons injured through the negligence of employees engaged in the manifold activities of the federal government, and found it desirable to modify the government immunity from suit and to give relief to injuried persons through the procedure of the courts rather than through private statutes which burdened the legislative [fol. 59] branch of the government and caused delay in the consideration of complaints. Hence the Federal Tort Claims Act was passed. It seems unreasonable, however, to conclude that Congress, while accomplishing these desirable purposes, intended at the same time to subject every injury sustained by a member of the armed forces in the

execution of military orders to the examination of a court of justice if the injured person should make the claim that his injury was caused by the negligence of a superior officer. If this were so, the civil courts would be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States. We think this consideration too weighty to be swept aside by adverting to the exceptions relating to military personnel which were contained in bills submitted to Congress when the matter was under examination. When a statute is subjected to the interpretation of the courts, too much weight should not be given to the language contained in discarded measures or to the statements of legislators in the course of debate. *Order of Conductors* v. *Swan*, 329 U. S. 520, 529. *Jewell Ridge Corp.* v. *Local*, 325 U. S. 161, 168.

This conclusion is fortified by the considerations enumerated and relied on in the opinion of Judge Chesnut and that of the Second Circuit in the Feres case. The distinctively federal character of the government-soldier relationship is recognized in *United States* v. *Standard Oil Co.*, 322 U. S. 301, 305, where the extent to which state law may govern the relationship between military personnel and persons outside the military establishment was contrasted with [fol. 60] the complete subjection to federal authority of the relationship between persons in the military service and the government itself. That state law governs in suits under the Federal Tort Claims Act is shown by the provision that the United States is liable for injuries caused by the negligence of a government employee acting within the scope of his employment under circumstances where a private person would be liable to the claimant under the law of the place where the act of omission occurred; but it is not reasonable to suppose, in the absence of an express declaration on the point, that Congress intended to adopt so radical a departure from its historic policy as to subject internal relationships within the military establishment to the law of negligence as laid down by the courts of the several states.

The service man is not left without protection by the interpretation of the statute, for as pointed out in the

opinion of the District Court, 76 Fed. Supp. 711, Note 1, Congress has long had in mind the peculiar dangers to which the military man is exposed, and has accordingly made elaborate provisions for pay and allowances and retirement benefits for persons in the Army and the Navy, in addition to medical and hospital treatment, which are always available. An analogous situation in suits by seamen against the United States under the Public Vessels Act led the court to decide that the permission granted to persons to libel the United States in personam for damages caused by the negligent handling of a public vessel refers to damages suffered by third persons but not by members of the ship's company. *Dobson* v. *United States*, 2 Cir., 27 F. 2d 807; *Bradey* v. *United States*, 2 Cir., 154 F. 2d 742.

Affirmed.

[fol. 61] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5815

ARTHUR K. JEFFERSON, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the District of Maryland

JUDGMENT—Filed and entered December 19, 1949

This cause came on again to be heard on the transcript of the record from the United States District Court for the District of Maryland, and was re-argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

John J. Parker, Chief Judge, Fourth Circuit; Morris A. Soper, U. S. Circuit Judge; Armistead M. Dobie, U. S. Circuit Judge.

[fol. 62] January 20, 1950, petition of appellant for a stay of mandate is filed.

IN UNITED STATES COURT OF APPEALS

ORDER STAYING MANDATE—Filed January 25, 1950

Upon the petition of the appellant, by his counsel, and for good cause shown,

It is ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 24, 1950.

John J. Parker, Chief Judge, Fourth Circuit.

[fol. 63] IN UNITED STATES COURT OF APPEALS

ORDER AUTHORIZING CLERK TO USE ORIGINAL TRANSCRIPT OF RECORD IN MAKING UP RECORD FOR USE IN THE SUPREME COURT OF THE UNITED STATES ON APPLICATION FOR WRIT OF CERTIORARI

FOR REASONS APPEARING TO THE COURT,

It is ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

[fol. 64] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 381, Misc.—

ARTHUR K. JEFFERSON, Petitioner,

vs.

THE UNITED STATES OF AMERICA

On petition for writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI ETC.—March 13, 1950

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is ordered transferred to the appellate docket as No. 667 and assigned for argument immediately following No. 558, Feres vs. United States.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.